UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 10, NASHVILLE RESIDENT OFFICE

JOHNSTON FIRE SERVICES LLC

Respondent

and

Case Nos. 10-CA-175681
10-CA-177542
10-RC-177308

ROAD SPRINKLERS FITTERS LOCAL UNION 669

Charging Party

RESPONDENT JOHNSTON FIRE SERVICES LLC'S POST-HEARING BRIEF

Respondent Johnston Fire Services LLC, respectfully offers this post-hearing brief and urges a Decision and Order finding that the evidence of record fails to establish the unfair labor practices alleged-all as more fully set forth and supported below.[1]

I. FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Brief Overview of Respondent's Business

Respondent is a small company located in Paducah, Kentucky that is engaged in the sprinkler installation business. It typically employs only 5 or 6 people. It was awarded a subcontract to install sprinklers for the construction of the South Marshall Middle School near

[1] Throughout this Post Hearing Brief, Johnston Fire Services LLC will be referred to as "Johnston" or "Respondent." Road Sprinkler Fitters Local Union 669 will be referred to as the "Union" or "Charging Party." Counsel for the General Counsel will be referred to as "General Counsel." References to Administrative Law Judge Keltner W Locke will be referred to as "ALJ." References to the National Labor Relations Act will be shortened to "NLRA" or the "Act."

Benton, Kentucky. This was an extremely important project for the company and one that required a stringent time frame to complete. The school was slated to open in August, 2016.

Respondent is not currently unionized. Its owner, David Johnston, was formerly a member of the Union having gone through the Union apprenticeship. He eventually became a journeyman sprinkler fitter. (TR 25-56)[2] His company was signatory to a contract with the Union in the late 90's. (TR 26)

The employees who primarily worked on the South Marshall Middle School project were the owner David Johnston, as well as Zeb Gordon and Michael Pirtle. When Pirtle was discharged on March 31, 2016, he was replaced by Robert Rhodes. Below is a brief overview of their respective employment with Respondent.

B. Brief Overview of Mr. Pirtle's Employment with Respondent

Glen Michael Pirtle ("Pirtle") was last hired by Respondent in December, 2015. He had previously worked for the company three or four other times, each time for only a period of a few months. (TR 94) As testified by Tracy Oliver, Respondent's Office Manager, the company could typically expect "three or four good months out of Mike before he started kind of slacking." (TR 168) Pirtle testified that he previously quit Johnston for better job opportunities. (TR 95)

Pirtle understood the importance of the middle school project and was aware of the timeline for completion. (TR 95) He testified that upon being hired, David Johnston emphasized the importance of not missing work. (TR 90)

Pirtle's attendance, however, was abhorrent. He was absent from work on January 11, 12, 13, and 27. He left work early on February 12. He walked off the job on February 24.[3] The next

[2]References to the Transcript of Record will be abbreviated as "TR."
[3] Respondent Exhibit 5 is a calendar that summarizes the dates in which Pirtle was absent or tardy/late in January-March, 2016.

day, February 25, he called Tracy Oliver and informed her he was hazy and couldn't remember the events of the previous day. He informed Oliver that had he not left the work site, he would have broken David Johnston's jaw. (TR 172) Oliver informed him that he should not return until he saw a doctor. (TR 172) As a result, he was not at work from February 25 through March 7. During this time period, Pirtle recalled that the project was at a point where only one worker was needed. (TR 92)

Oliver called Pirtle on March 7 and informed him he could return to work. According to Oliver, Pirtle "promised me he could go back on the job and everything would be fine." (TR 173) Oliver testified that David Johnston's wife was insistent that the company allow Pirtle to return given the pressure her husband was under to complete the project. Given Pirtle's familiarity with the project, he was permitted to return. (TR 173)

Despite his promise to Oliver, it did not take long for Pirtle's poor work habits to resume. He overslept on March 23 and was two hours late for work. (TR 174) At this point, Oliver knew Pirtle's tenure with the company was "about done." On March 28, Pirtle was again a "no show/no call." Oliver called Pirtle to inquire of his whereabouts. He informed her he had overslept and "guessed he needed to call in sick." (TR 174-175) Oliver testified that she "felt like he was hung over and just asleep and didn't get up for work and knew he couldn't come back in again late, that he was just going to say he was sick." (TR 175) At this point, Johnston had grown tired of Pirtle's work habits and asked Oliver to find a replacement. (TR 33)

Oliver contacted Robert Rhodes who had made previous inquiries for employment with Respondent. (TR 175) On Wednesday March 30, Oliver informed Johnston that she found a replacement—Robert Rhodes-- and he could start immediately. (TR 176) The next day, Thursday, March 31, Johnston informed Pirtle he was being terminated.

1. **Alleged Concerted Activity of Pirtle.**

Todd Johnson ("Todd")[4] was the organizer for the Union. It was certainly no secret he had visited the Marshall Middle School site and spoke to Pirtle and Zeb Gordon. In fact, Pirtle himself informed Johnston that Todd talked to him while visiting the site. Pirtle once told Johnston that he could not believe Johnston did not run into Todd at the site. (TR 30) Oliver testified that Pirtle described the event as humorous. (TR 178)

It was not unusual for Todd Johnson to speak with Respondent's employees. A year earlier, he visited a project known as the Lakes of Paducah where he spoke with Pirtle and other employess. (TR 34) However, no employee, including Pirtle, was fired as a result. Johnston testified that it did not bother him that Todd was speaking to his employees: "He can talk to them at any time. I mean, they're either going to stay with me or they're going to go with Todd." (TR 30)

Zeb Gordon, the other employee on the school project, informed Johnston of a meeting he had with Todd, Pirtle and the attorney for the Union, Mr. Suetholz. Gordon testified that they discussed a potential prevailing wage claim against Respondent. (TR 133) A few days later, Gordon took it upon himself to speak with Johnston about the meeting. Gordon described his conversation with Johnston as follows:

Q. Okay. What did you tell Mr. Johnston?

A. Just about that I'd set down and met with these people and talked to them about it and, you know, were explaining everything that they'd said about it.

---

[4] Mr. Johnson is referred to by his first name or alternatively "Todd Johnson" to avoid confusion given the similarities between his last name and that of David Johnston.

Q. And when you say "it." What is "it?"

A. The issue of prevailing wage.

Q. And would that be like a potential claim?

A. Yes.

Q. A potential lawsuit?

A. Yes.

Q. Okay. Did you tell him about a potential union campaign?

A. No.

Q. Did you tell him who all was at that meeting?

A. Yes. I believe so.

Q. Okay. Did you mention that Mr. Pirtle was also at that meeting?

A. Yes.

Q. Okay. Why did you go talk to David Johnston about this meeting?

A. I had just—it was just one of those things. I had been thinking about it for a while, and I just thought that –you know, and if I had been talking to someone else about it, then I should at least tell the other person.

Q. You wanted to be open?

A. Yes.

Q. You wanted to—you say you'd been working at Johnston for a while, so was there a sense of wanting to talk with him first before you did anything.

A. Yes.

Q. Okay. Were you nervous at all about talking to Mr. Johnston?

A. Just a little bit, just for the fact of, you know, what it was but just that I felt better, you know, just getting it off my chest putting—you know, being honest and—

(TR 134-135)

Gordon testified that Johnston didn't seem angry towards him "or anything like that." (TR 136) Gordon acknowledged that Johnston never told him not to talk with the Union; nor was he ever disciplined or terminated by the company. (TR 138) He eventually signed a union card and voted in the election. In September, 2016, however, he voluntarily quit his employment with Respondent and joined the Pipefitters Union. (TR 139) He now works for a company called DK Construction.

Gordon testified that he believed his discussion with David Johnston occurred the evening prior to the day Pirtle was terminated. (TR 134) By this time, however, David Johnston had already decided to terminate Pirtle. (TR 146) This decision occurred on Monday, March 28 when Pirtle was a "no show/no call." On March 28, Johnston informed Tracy Oliver to find a replacement for Pirtle. (TR 175) Oliver informed Johnston she had a replacement on Wednesday, March 30. 9TR 176) Johnston terminated Pirtle the next day, March 31.

Oliver's notes contained at GC Exhibit 6[5] confirms that Pirtle was terminated on March 31 and that he was being replaced by Robert Rhodes. (TR 190) Obviously the decision to terminate Pirtle was made in relation to obtaining a replacement; not in the spur of the moment following Johnston's discussion with Zeb Gordon the evening before.

2. Events of March 31, 2016.

On the morning of March 31, Johnston informed Pirtle he was terminated. Pirtle immediately asked if he was being terminated because he spoke with Todd Johnson. (TR 33) Todd Johnson acknowledged that he instructs potential members to engage in this tactic if being terminated and would not be surprised if Pirtle made such an inquiry. (TR 68-69) Johnston

[5] Reference to General Counsel Exhibits will be referred to as "GC."

informed him that he was being fired because "he does not show up to work, he doesn't call, and doesn't let the company know." (TR 33)

Pirtle's recollection of the event was sketchy. He doesn't remember if he brought up the Union and conceded "it has been awhile." (TR 98) He doesn't remember being trained by Todd to make the statement 'you're firing me because I talked to Todd Johnson" and apologized "for the lack of memory." (TR 98)

General Counsel alleges that the events of March 31 amount to improper interrogation and coercion because Johnston is alleged to have asked Pirtle if he had been talking to Todd Johnson. This position, however, is nonsense in light of the fact it was Pirtle himself who asked if he was being terminated because he had spoken to Todd Johnson. It was no secret that Pirtle had been talking to Todd Johnson. (TR 48) At no time, however, did Johnston inform Pirtle not to speak to Todd Johnson. (TR 49) Nor was the employment decision motivated by Pirtle's discussions with Todd Johnson.

C. Brief Overview of Mr. Rhodes' Employment with Respondent

Upon replacing Pirtle, Rhodes also worked primarily on the middle school project. Oliver believes he started the day after Pirtle's termination or April 1. At a minimum, he started the following Monday, April 4. (TR 176; 214) Rhodes worked for the company for only 39 days. (TR 179) During this brief time, he was late to work on May 16 and May 18, off work to go to court on May 3, and late to work because of a flat tire on April 19. (TR 222)

Friday, May 27 was the last date Rhodes actually worked for the company. On that date, he texted Oliver to inform her he had to go back home after he got to work and was an hour late. (TR 182) (GC Exhibit 7) The company was closed on May 30, Memorial Day. Rhodes failed to come to work on May 31 texting Oliver that he was "Not gonna make it today. Will be back

tomorrow." (TR 179-180) (GC Exhibit 7) However, he failed to work the next day, June 1, texting David Johnston he was not feeling well. (TR. 180)

On June 2, David Johnston intended to terminate him given his absences. As testified by Oliver, following Rhodes' absence on June 1, Johnston "called uncle again and said I cannot get this job in if I do not have reliable help." (TR 180) A proposed letter was drafted on behalf of Respondent summarizing the intended termination. (See, R Exhibit 3)[6] The letter is dated June 2, the date Respondent intended to terminate Rhodes. As pointed out in the letter, Rhodes had only been employed by the company for a short period "and your attendance during this short time period is unacceptable."

1. Events of June 2, 2016

However, Johnston never got the opportunity to present the termination letter to Rhodes on June 2 as he anticipated. That morning, at 7:30 a.m., the normal starting time for work, Rhodes was again a no show/no call. While in the company's job trailer, his absence was documented in writing and witnessed by David Johnston and Zeb Gordon. (See, R Exhibit 1) About 30 minutes later, Johnston observed Rhodes arriving in a SUV pulling what appeared to be a U-Haul type trailer. (TR 35) He did not park in a normal parking spot but rather, appeared to be parked "like he was going to be there just for a few minutes, run in and grab something, then take off." (TR 36) According to Johnston, Rhodes did not appear dressed for work. (TR 36)

At that point Rhodes handed Johnston a "Notice of Intent to Strike" letter signed solely by him that was pre-dated May 31, 2016. The notice indicated that he and his co-workers intended to go out on strike the next day, June 3 if the company did not pay what they viewed to be the appropriate prevailing wage classification on the middle school project. (GC Exhibit 2)

[6] References to Respondent's Exhibits will be referred to as "R."

A dispute exists whether Rhodes was terminated by Johnston on June 2 or whether Rhodes simply got his tools and quit. Rhodes' story, however, is factually suspect and is contradicted by the evidence of record. He testified that he arrived on the site at 7:30 a.m. He claims David Johnston was not at the site at that time. (TR 119) He testified he went to the job trailer and filled out some paperwork. (TR 119) Since he could not find Johnston, he claims he emailed a copy of the strike notice to the company's email address at 8:00 a.m. (TR 119) This testimony is obviously an effort to explain away the fact he was emailing the Notice of Intent to Strike 30 minutes *after* he was supposedly at work. Unfortunately for Rhodes, however, he was unaware that Zeb Gordon and Johnston had already documented the fact he was not at work at 7:30 a.m. as he claimed in the hearing. (TR 123)

Zeb Gordon testified that he and Johnston were both in the trailer at 7:30 a.m. He acknowledged Rhodes was a no show/no call. (TR 164) Obviously, Rhodes was not in the trailer doing paperwork as he claimed in the hearing.

The evidence of record is clear. Rhodes had no intention of actually working on June 2. He came to get his tools and leave. The reason? He already had another job for a different sprinkler company, Tri-State Fire Protection. Todd Johnson testified that Rhodes was in the process of getting the new job when he handed him the strike letter. (TR 72) Todd Johnson further testified that he was helping Rhodes obtain the job at Tri-State during the very time in which Rhodes was claiming to Respondent he was sick and could not make it to work. (TR 75-76)

Since Rhodes was leaving for a new job, it makes perfect since that he would appear at the site on June 2 to retrieve his tools. As discussed below, the Notice of Intent to Strike was a charade to give the Union an argument that Rhodes was terminated for engaging in union activity and

hence, eligible to vote at the union election. Had he simply quit, he would not have been eligible to vote in the election, a point conceded by Todd Johnson. (TR 73)

2. Respondent Lacked Knowledge of any Concerted Activity by Rhodes

No evidence was presented that Respondent was aware of any union or concerted activities by Rhodes prior to the time he handed Johnston the Notice of Intent to Strike. Rhodes specifically testified that he never spoke to Johnston about any union issues or wage concerns prior to giving him the strike letter. (TR 110) Hence, it was necessary for the Union to devise the charade by which Rhodes would appear at the site on June 2, hand Johnston the Notice of Intent to Strike letter and leave for his new job at Tri-State.

Todd Johnson was sure he discussed with Rhodes the need to be terminated so he could vote:

Q. Did you ever talk to him about the need to be terminated so he could vote?

A. I'm sure we discussed it.

Q. In your point, did you tell him that he needed to always say that he was terminated for handing him this letter?

A. I don't follow you there.

Q. You instructed him to always maintain that he was terminated for handing his employer this letter?

A. Yes. I told him to give the employer the strike letter.

(TR 75)

Todd Johnson further testified as follows on the charade surrounding the Notice of Intent to Strike letter:

Q. This was really a guise, a charade for him to present this to David Johnston so the Union would have a claim that he was fired for engaging in protective activity?

A. This is so he could go back to work.

Q. He was going to work for Tri-State?

A. Right.

(TR 73)

Despite the language of the strike letter, Todd Johnson testified that no other employees were going on strike and further testified it was Rhode's individual action. (TR 75) Zeb Gordon testified that he had no conversations with Rhodes regarding a strike or the strike letter. (TR 159; 163) He did not follow Rhodes in any strike activity (TR 159) and never discussed a union campaign with Rhodes. (TR 162) Gordon recalls telling Rhodes he had filed a prevailing wage lawsuit against Respondent. (TR 164) Gordon informed Rhodes that despite the suit, no punitive action had ever been taken against him by the company. (TR 164) He conceded that it was up to the court system to decide that issue. (TR 159-160)

Rhodes' testimony regarding the strike notice was unconvincing. First, he informed Todd Johnson that he needed the strike letter because he was worried that if he spoke up about wages, he would be let go. (TR 109) Yet, he specifically testified he "was in no danger of being fired." (TR 121) He had never previously discussed any wage issue with Johnston (TR 109) Therefore the ALJ would have to find that Rhodes' desire to provide notice of a strike just happened to coincide with the time he was quitting the company—which would have disqualified him from voting in the election—rather than a charade for allowing Rhodes to vote in the election. Despite the monumental undertaking of a strike, purportedly on behalf of *all* employees, he was "not certain" and could "not recall" if he ever spoke to Zeb Gordon about it. (TR 126-127) Finally, he acknowledged he did not actually engage in any strike activity on Friday, June 3 as threatened in the strike notice. (TR 122) His testimony regarding his intent to strike was further revealing:

Q. You had never intended to engage in a strike, did you?

A. Sir, I can't tell you I did or did not intend to engage in a strike.

(TR 122)

D. Brief Overview of Mr. Gordon's Employment with Respondent

The only true comparator employee working on the middle school project was Zeb Gordon. Only he, Pirtle, David Johnston and later Robert Rhodes worked on the project. According to Oliver, Gordon had almost perfect attendance. (TR 216) David Johnston testified that Gordon "never missed work" and that "he was at work on time, early and he was great help." (TR 31)

As discussed above, Gordon also met with the union organizer and the Union's attorney, signed a union card, and filed a prevailing wage lawsuit against Respondent. However, not once was Gordon disciplined, interrogated, threatened, or terminated from his employment by Respondent. He quit voluntarily in September, 2016 to pursue what he considered a better job opportunity.

When his employment history is contrasted with that of Pirtle and Rhodes, it is apparent that Respondent's employment decisions were not motivated by any purported concerted activity and instead, were based on legitimate business decisions.

II. LEGAL ARGUMENT

A. Alleged Section 8(a)(3)/8(a)(1) Violations

The Consolidated Complaint alleges violations of Sections 8(a)(3)/8(a)(1) based on allegedly adverse employment actions that General Counsel contends were taken by Johnston in retaliation for Pirtle and Rhodes' union activities. As to Pirtle, the union activities are alleged to have taken the form of meeting with the Union organizer and the Union's attorney to discuss a prevailing wage claim. As to Rhodes, the union activity is limited to handing his employer a

Notice of Intent to Strike letter. As discussed below, General Counsel has failed in its burden to establish a violation.

To establish that discharge or discipline violates Section 8(a)(3) of the Act, the General Counsel must prove the employer knew of the employee's union activity and that the employee was disciplined or discharged as a result of the employer's unlawful motivation based on union animus. *Wright Line, a Div. of Wright Line, Inc.* 251 NLRB 1083, (1980); *enforced* 662 F.2d 899 (1st Cir. 1981), c*ert. denied* 455 U.S. 989 (1982); *Wheeling-Pittsburgh Steel Corp. v. NLRB*, 618 F.2d 1009, (3rd Cir. 1980); *Sterling Aluminum Co. v. NLRB*, 391 F.2d 713, (8th Cir. 1968). If such a showing is made, the burden shifts to the employer to demonstrate that the termination would have occurred regardless of the protected conduct. *See Wright Line,* 251 N.L.R.B. 1083, 1089 (1980), *enforced,* 662 F.2d 899 (1st Cir.1981), *cert. denied,* 455 U.S. 989, 102 S.Ct. 1612, 71 L.Ed.2d 848 (1982). While the General Counsel's burden of proof may be satisfied by circumstantial evidence, it cannot be sustained by reliance on "....suspicion, surmise, implications, or plainly credible evidence." *Concepts & Designs v. NLRB*, 101 F3d 1243, 1244 (8th Cir. 1996).

The General Counsel failed to establish Respondent's union animus. As to Pirtle, the General Counsel failed to establish that his termination was in any way unlawfully motivated or would not have occurred but for the employee's protected conduct. As to Rhodes, the General Counsel failed to establish that he was engaging in concerted or protected activity nor was any adverse employment action taken against him.

B. The General Counsel Failed to Establish Respondent Possessed Union Animus

The record contains no evidence of any union animus by Respondent. To the contrary, David Johnston had been a journeyman pipefitter and at times, his company had been signatory

to a union contract. He has never demanded that his employees refrain from talking to the union organizer and was well aware that the union organizer routinely visits construction sites where Respondent is working.

General Counsel will undoubtedly argue that union animus was established during the termination of Pirtle. During the termination, it is alleged that Johnston asked Pirtle if he had been talking to Todd Johnson. However, the evidence presented on that issue far from establishes anti-union animus. It was Pirtle himself, having been trained to do so by the Union, who inquired if he was being terminated because he had been talking to Todd Johnson. The fact that Johnston followed up by asking him to confirm he had been talking to Todd Johnson is meaningless and does not establish union animus.

No evidence was presented of any threats, coercion or intimidation tactics by Johnston. In fact, when Zeb Gordon informed David Johnston he had met with the Union, he conceded that Johnston was not upset, did not ask him to refrain from speaking to the Union, or made any anti-union comments. The General Counsel has not met its burden of establishing the requisite animus element.

C. As to Pirtle, the General Counsel Has Not and Cannot Establish that his Discharge Was Due to Engaging in Union Activities; Even if a Prima Facie Case is Established, Respondent Established that he would have been Discharged Regardless of any Protected Activity

Neither the Union nor General Counsel provided or presented any testimony or evidence directly calling into question Johnston's motivation for discharging Pirtle. The only evidence presented was testimony that on the day before he was terminated, Zeb Gordon informed David Johnston that he and Pirtle had met with the Union organizer and the Union attorney to discuss a possible prevailing wage lawsuit. However, the record clearly establishes that Johnston made the decision to terminate Pirtle on March 28, 2016, prior to his discussion with Gordon. While

evidence was presented that Johnston knew that Todd Johnson had visited the site and spoken with Pirtle prior to this date, no adverse action was taken against Pirtle as a result. To the contrary, Pirtle was terminated for one simple reason: his employer grew tired of his continued absences and tardiness from work at a time when attendance was critical to the employer.

On March 28, Pirtle was once again a no show/no call. When Tracy Oliver inquired of his whereabouts, he informed her he had overslept and "guessed he would take a sick day." This was on the heels of Pirtle being two hours late on March 23 because he had overslept and also on the heels of an extended period of absences because he was "hazy" and could not remember the events of the day before. (TR 172)

Respondent presented overwhelming evidence of the critical importance the middle school project was to the company. An employee's continued failure to show up for work is certainly a legitimate business reason for terminating the employee. The NLRA does not preclude employers from discharging employees for legitimate reasons. The Act "does not interfere with the normal exercise of the right of the employer to select its employees or to discharge them…[t]he Board is not entitled to make its authority a pretext for interfering with the right of discharge when that right is exercised for other reasons than…intimidation and coercion." FES, 331 NLRB 9, 164 LRRM 1065 (2000) citing *Borin Packaging Company,* 208 NLRB 280, 281 (1974) and quoting *NLRB v Jones & Laughlin Steel Corp.*, 301 U.S. 1, 45-46 (1937).

Neither General Counsel nor the Union disputes that Pirtle failed to come to work on March 28 because he overslept. Nor did they dispute the other instances of absenteeism by Pirtle. Presumably, General Counsel will rely on timing *i.e.*, that Pirtle was fired once Johnston

was informed by Gordon that he and Pirtle had met with the Union. As enumerated below, this argument is unavailing.

First, while timing may be used as circumstantial evidence, a decision based on this single fact requires resorting to speculation, surmise and implication which as pointed out in *NLRB v. RELCO Locomotives, Inc.* 734 F 3d 764, 782 (8th Cir.2013) is prohibited.

Secondly, this evidence clearly establishes that Pirtle would have been discharged regardless of any protective activity. Zeb Gordon testified that he informed Johnston of the meeting sometime on March 30. Johnston made the decision to discharge Pirtle on March 28 and was only awaiting word by Tracy Oliver that a replacement had been found. This also occurred on March 30. (TR 176). In short, Pirtle was going to be terminated regardless of any union activity.

Third, not only did Zeb Gordon inform Johnston that he and Pirtle had met with the Union, shortly thereafter he filed a lawsuit against the company, signed a union card and supported the unionization efforts. Yet, Gordon was never disciplined or retaliated in any way. The difference? Gordon came to work and did his job. Pirtle did not. As a result, Respondent exercised its right to discharge Pirtle's employment. This overwhelmingly establishes the absence of a nexus between Pirtle's alleged union activity and his discharge. Pirtle was going to be discharged irrespective of whether he met with the Union and the Union's attorneys or engaged in any other union activities.

D. **Rhodes did not Engage in Concerted or Protected Activity**.

The evidence of record demonstrates that Rhodes failed to show up to work on May 31 and June 1. During this time, as candidly acknowledged by Todd Johnson, Rhodes was in the process of obtaining a new job with Tri-State Fire Protection. As further candidly conceded by

Todd Johnson, he discussed the need for Rhodes to give Johnston the Notice of Intent to Strike letter as a means by which he could claim he was terminated for engaging in union activity. (TR 75) Rather than quit—which would have disqualified him from voting--a charade was devised by which Rhodes would hand Johnston the strike notice and leave the site to start another job. The strike notice was not made to seek mutual aid or protection and therefore, is not protected. It is well established that to be for the purpose of mutual aid or protection, "concerted activity must seek to 'improve terms and conditions of employment or otherwise improve [employees'] lot as employees. *Dignity Health d/b/a St. Rose Dominican Hospitals*, 360 NLRB No. 126, slip op. at 8 (2014) (quoting Eastex v. NLRB, 437 U.S. 556 (1978)).

Here, the evidence clearly demonstrated that Rhodes never once discussed going on strike with his co-worker, Zeb Gordon. Todd Johnson conceded no other employees were going to follow Rhodes on strike. Gordon testified that he had no discussion with Rhodes about going on strike and only learned of it after the fact. Rhodes himself testified that he could not recall one way or the other if he had such discussions with Gordon. Despite the monumental undertaking of a strike, purportedly on behalf of *all* employees, he was "not certain" and could "not recall" if he ever spoke to Zeb Gordon about it. (TR 126-127) Finally, he acknowledged he did not actually engage in any strike activity on Friday, June 3 as threatened in the strike notice. (TR 122) His testimony regarding his intent to strike was further revealing:

Q. You had never intended to engage in a strike, did you?

A. Sir, I can't tell you I did or did not intend to engage in a strike.

(TR 122)

While an individual acting alone may be engaging in concerted activity, to do so "it must appear at the very least that [the conversation] was engaged in with the object of initiating or

inducing or preparing for group action or that it had some relation to group action in the interest of the employees." *Id.* (quoting *Mushroom Transp. Co. v. NLRB,* 330 F.2d 683, 685 (3d Cir.1964)).

Here, there is no evidence that Rhodes intended to go on strike himself let alone to induce or prepare others to do so. In fact it is clear that Rhodes had no interest in resolving his alleged grievance with Johnston but rather, he intended to quit for another job opportunity.

Further, even if Rhodes is determined to have engaged in concerted activity, the ALJ should not deem such activity protected. The strike notice was nothing but a charade not a reasonable means of protest under the circumstances. Zeb Gordon had already informed Rhodes that he was pursuing his grievance with the company by filing a prevailing wage lawsuit. He further acknowledged that it was up to the court system to adjudicate that issue. As pointed out in *Bob Evans Farms, Inc. v. N.L.R.B.,* 163 F.3d 1012, 1024 (7th Cir. 1998), the reasonableness of the means of protest is one of a variety of factors that are examined in order to determine whether employee activity is protected:

> In view of the wide disparity between grievance and means of protest in the present case, there is no reason to explore to what extent in principle a strike is a proper response to this kind of grievance. For present purposes, it is enough to reiterate that the Act does not protect employees who protest a legitimate grievance by recourse to unduly and disproportionately disruptive or intemperate means.

Id. at 1024.

E. **Rhodes Suffered no Adverse Employment Action.**

The evidence of record demonstrates that Rhodes was leaving the employment of Johnston to work for Tri-State Fire Protection. While David Johnston had every intention of terminating Rhodes on June 2 given his failure to work for two straight days, he never actually terminated him. On the morning of June 2, Rhodes was a no show/no call. This was documented at 7:30 a.m. by Johnston and Zeb Gordon. (R. Exhibit 1) Rhodes' claim that he

arrived for work on June 2 at 7:30 a.m., was clearly refuted by the testimony of his co-worker Gordon. He obviously did not arrive until sometime after 8:00 a.m. which coincidentally is the time he also emailed the strike notice to the company's email address. When he arrived, he parked in a manner indicating that he was only going to be there for brief period of time and then leave. Given the totality of the record, it is clear that Rhodes had planned only to show up to hand Johnston the strike notice, get his tools and leave to start a new job. Since it appeared to Johnston that Rhodes was quitting, he never discharged his employment. Given that he suffered no adverse employment action, General Counsel cannot establish a prima facie case of a Section 8(a)(3) violation.

E. General Counsel has not Established that any Alleged Termination of Rhodes Was Due to Engaging in Union Activities; Even if a Prima Facie Case is Established, Respondent Established he would have been Discharged Regardless of any Protected Activity.

It is clear from the record that Johnston made a decision to terminate Rhodes on the morning of June 2 because of his failure to show for work. A letter was prepared for David Johnston's behalf so that he could give it to Rhodes when arrived for work on June 2. (R Exhibit 3) At this time, no evidence has been presented that Johnston was aware of any union activity by Rhodes. The record is abundantly clear on that point. Rhodes never discussed any aspect of his employment conditions with Johnston. Johnston was never informed that Rhodes was discussing wages or any other issue with his co-workers or the union. Similar to Pirtle, it cannot be refuted that Rhodes failed to appear for work on May 31 or June 1 and did not appear for work on June 2. As discussed above, termination of an employee for failing and refusing to show up to work is a legitimate business reason.

At the time he intended to terminate Rhodes, he had no knowledge that Rhodes was engaging in protected activity. Even assuming that Rhodes was actually discharged by Johnston on June 2, the identical argument set forth above regarding Pirtle applies equally to Rhodes. Gordon, who was openly engaging in union activities, was never terminated or disciplined by Respondent. The reason? Gordon showed up for work while Rhodes did not. As such, it is established that Rhodes would have been terminated regardless of any protected activity. This is best exemplified by the fact a letter had already been drafted for the intended purpose of informing Rhodes that he was being terminated *prior* to any knowledge by Johnston that Rhodes was going on strike or was complaining about his wages. As such, no Section 8(a) (3) violation may be found.

III. CONCLUSION

For all the forgoing reasons, as well as the testimony and evidence of record, this no merit to any of the claims made by General Counsel and the Consolidated Complaint should be dismissed in its entirety.

Respectfully submitted,

KEULER, KELLY, HUTCHINS
& BLANKENSHIP, LLP
100 South 4th Street
Suite 400
Paducah, KY 42001
Phone: (270) 448-8888
Fax: (270) 448-0998

By /s/David L Kelly
David L Kelly
dkelly@kkhblaw.com

Attorneys for Respondent Johnston Fire Services LLC

CERTIFICATE OF SERVICE

I hereby certify that the foregoing was electronically filed on November 29, 2016 utilizing the National Labor Relations Board's E-Filling system, resulting in timely service of same, and was otherwise served via electronic mail upon the following:

David O'Brien Suetholz, Esq.
Kircher Suetholz & Associates, PSC
515 Park Ave
Louisville, KY 40208-2311
Via electronic mail: dave@unionsidelawyers.com

Katherine Miller
Field Attorney
NLRB
Region 10
810 Broadway Suite 302
Nashville, TN 37203
Via electronic mail: Katherine.Miller@nlrb.gov

Attorney for Road Sprinkler Fitters Local 669

DATED this 29th day of November, 2016

/s/David L Kelly
David L Kelly